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IN THE

Supreme Court of the United States

October Term, 1962

No. 455

FAYE LYONS,
Appellant,
vs.
ELSINORE C. MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND,
Appellee.

PETITIONER'S REPLY TO APPELLEE'S OPPOSITION BRIEF

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The decision of the Circuit Court below is in conflict with this court's decision in *Erie v. Tompkins,* 304 U.S. 64; 82 L. ed. 1188 that the laws of the State and the highest court of California must apply. (Section 47(2) Civil Code of California), *Davis v. Hearst,* 160 Cal. 143, *MacLeod v. Tribune Publishing Co.,* 52 Cal. 536, 552. This court must therefore grant certiorari to correct the error of the court below in its

failure to apply California law to the facts of this case.

Wichita Royalty Co. v. City National Bank, 306 U.S. 103, 106;
Waialua Agricultural Co. v. Christian, 305 U.S. 111;
Ruhlin v. New York L. Ins. Co., 302 U.S. 681.

The Circuit Court, while stating the California law as to privilege, did not apply it. Neither has appellee. Both have made the error of which we complain and which alters the established law of California.

The defense of privilege in California must be based upon only those facts *known* to the libelant at the time the libelous and untruthful pleading charging adultery was filed. (Section 47(2) Civil Code of California) *Davis v. Hearst,* 160 Cal. 143. The privilege is lost if the publication is motivated by hatred or ill will toward plaintiff. *Brewer v. Second Baptist Church,* 32 Cal. (2) 791, 797.

Both the Circuit court and appellee change this rule to hold that matters presented in the trial six years later may be relied on as a defense, even though not relied on at the time the libel was committed.

The vice permeates the massive response of appelle. Appellee goes to the testimony given in the trial six years later and set up in the trial transcript for evidence to support the defense of privilege in the

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false publication and libel committed by the appellee six years before in the false filing of an accusation of adultery in 1955.

Not what was developed at the *trial,* but only what appellee knew at the time of the committing of the libel is available on this issue under California law.

> 47(2) *Civil Code of California;*
> *Davis v. Hearst,* 160 Cal. 143.

Like probable cause for a search without a warrant under the Fourth Amendment, it is not made legal by what it turns up.

> *Silverthorne Lumber Co. v. U.S.,* 251 U.S. 385;
> *Schiller v. U.S.,* 9 Cir. 35 F. (2) 865;
> *U.S. v. Roberts,* 90 F. Supp. 718;
> *U.S. v. Hinton,* 219 F. (2) 324.

Although the rule is correctly *stated* in the opinion sought to be reviewed herein (p. 2 Opinion) but the learned United States Court of Appeals, after correctly stating the law, proceeded forthwith to disobey it, and disregard it. Certiorari is therefore necessary to correct this conflict and failure to follow California law.

> *Erie v. Tompkins,* 304 U.S. 64;
> *Waialua Agricultural Co. v. Christian,* 305 U.S. 111.

That appellee followed the same error is the outstanding vice of her Opposition Brief. Twenty-three

times in her Opposition Brief respondent went to the trial transcript for evidence in the trial six years later to substantiate the issue of privilege (pp. 6, 7, 11, 15, 16 Res. Opp. Br.) at the time of filing the libelous pleading. Unless evidence given at the trial was known to respondent at the time of the libel, it is not available to respondent on the issue of privilege. This was not established.

It should be remembered that on the issue of truth the jury found the libel of having committed adultery to be untrue (Tr. p. 21).

The United States Court of Appeals, in paragraph five, page two, sets forth what respondent knew at the time of the libel as follows:

(1) The Blanche Lampert statement. (Exhibit 1)
(2) What her attorney, Murphy, told her.
(3) What neighbors told her.

What her attorney told her and what neighbors told her went to the issue of "truth" of the libel only and involved evidence tending to show the propensity "at large" of the husband. *None of this was connected to petitioner.*

As to petitioner and bearing on the issue of the defense of "privilege" *the Blanche Lampert statement* stands alone.

Respondent testified as follows:

"Q. Isn't it a fact Mrs. Gilliland, that you had no information other than the information given you by Blanche Lampert when you accused Faye Lyons and Miss Meyers of adultery with your husband?

"A. That's right." (Rep. Tr. p. 307-8)

Respondent augments the statement of Blanche Lampert which contained all she knew at the time of the libel in 1955 by the testimony of Blanche Lampert at the trial *in 1961* to amplify the evidence on the issue of privilege.

The learned United States Court of Appeals based its decision on the same error. Contrary to the laws of the State of California.

It also based its decision on a misstatement of the evidence.

On page two, paragraph five, the United States Court of Appeals identified the Blanch Lampert statement and proceeded to give purported evidence therefrom which was held to be sufficient to establish the defense of privilege.

Among the instances purporting to emanate from that legal source and in quotation marks is the following damaging statement concerning petitioner, to-wit:

> . . . that on the one occasion Mr. Gilliland "stayed with appellant all night at the Paradise Valley Guest Ranch."

The true quotation from the Blanche Lampert statement was:

> "He (Mr. Gilliland) got mad at Judge Blake and Phil Kent and went and stayed all night up there himself.
>
> Q. Up where?
>
> A. At Paradise Valley, when Faye was there."

We urge again the distinction between *staying all night with a certain woman* in a hotel and *staying all night in a hotel while a certain woman was registered there.*

This court will not allow a decision to stand which is based on an erroneous statement of facts, to do so would be to let justice miscarry on a false basis. This court will preserve the purity of its courts.

Sorrells v. U.S., 287 U.S. 435;
Olmsrad v. U.S., 277 U.S. 438, 72 L. Ed. 944.

LAW OF STATE NOT APPLIED

Next the learned United States Court of Appeals violates its own opinion that on the issue of privilege only what was known by the respondent at the *time* of the libel can be considered, by basing its opinion on two matters not known at the time of the libel but testified to six years later at the trial, to-wit:

(1) "that the two kissed on several occasions."
(2) "that appellant and Mr. Gilliland took a ten day automobile trip from Scottsdale, Arizona to Miami, Florida, together."

Neither of these statements is to be found in the Blanche Lampert statement nor were they a part of what her attorney, Mr. Murphy, told respondent nor a part of what neighbors told her. They constitute statements out of context of testimony given six years after the libelous false charge of adultery was filed and only given at the time of trial.

If ever a court's opinions require review to correct misstatements of fact baldly asserted therein and to eliminate application of conflicts of law with that of California inherent therein, this case belongs to that class.

If this opinion is allowed to stand, *Davis v. Hearst*, supra, stands repealed, by federal decision, contrary to *Erie v. Tompkins*, at least so far as the federal courts are concerned.

If this opinion is allowed to stand, the precedent for a new technique will be established wherein a court will be upheld if it states the correct legal principle even though it violates that same principle in its application to the facts and in the judgment.

If this opinion is allowed to stand, a new rule contrary to established jurisprudence will be promulgated to the effect that when adultery is sought to be proved or probable cause of it is sought to be established by indirect evidence, "propensity" on the part of one only of the parties will suffice and the present rule that "propensity" of *both* is required will vanish from the law.

This presents an important question of the law of libel which has not been, but should be resolved by this court.

CONCLUSION

It is respectfully urged that the writ of certiorari prayed for may issue, and the judgment of the court below reversed.

Respectfully submitted,

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